Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. 88-1491

IN THE SUPREME COURT
COURT OF THE UNITED STATES
OF AMERICA

TERM _____

KEITH MILTON RHINEHART,
a single person;
THE AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation;
KATHI BAILEY, a married person;
LILLIAN YOUNG, a married person;
TONI STRAUCH, a married person; and
ILSE TAYLOR, representing women who
were members of the Aquarian Foundation
on or after March 17, 1978;

Appellants,

v.

THE SEATTLE TIMES,
a Deleware Corporation,
d/b/a The Seattle Times;
WALLA WALLA UNION-BULLETIN, INC.;
ERIK LACITIS and JANE DOE LACITIS;
JOHN WILSON and REBECCA KAREN WILSON;
JOHN McCOY and KAREN McCOY;

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

JURISDICTIONAL STATEMENT

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30 pp

QUESTIONS PRESENTED

I. Did the State Trial Court violate Religion's First Amendment Rights to freedom of association and religion (as protected by the 14th Amendment) by dismissing defamation lawsuit when Religion failed to produce membership lists, ordered in discovery?

II. Did the State Trial Court violate Religion's First Amendment Rights to freedom of association and religion, by dismissing defamation lawsuit when Religion failed to produce videotapes of members, ordered in discovery, but not protected by a protective order although good cause for protection had previously been found by the court?

III. Did State Appellate Court violate Religion's right to due process and equal protection by applying RCW 4.84.185 in a manner to impose penalties for a "frivolous" appeal without providing clear criteria for when such penalties would be imposed, without imposing the same penalties against other similarly situated litigants and without considering that the only avenue to present the above Constitutional issues to the U.S. Supreme Court is to proceed through State Court even if the State Court is not likely to uphold the appeal?

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption. The Attorney General of the State of Washington is also receiving notice of this matter.

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Cert den. of ISSUE I herein, U.S. Supreme Court docket #82-1758.

GROUNDS FOR JURISDICTION

Plaintiffs/Appellants sued the Seattle Times et al for defamation and other causes. The trial court dismissed the action when Plaintiffs failed to produce membership lists and sacred videotapes as ordered in discovery (Appendix A). The appeal was filed in State of Washington Court of Appeals. The Court of Appeals affirmed the trial court by decision reported at 51 Wn. App. 561 (May, 1988) [Appendix E]. A motion of reconsideration was denied [Appendix F], and the State Supreme Court denied a petition for review on November 29, 1988 [Appendix G].

Jurisdiction is conferred in this court by 28 USC 2101 [C], and 28 USC 1257.

PROVISIONS AND STATUTES INVOLVED IN APPEAL

United States Constitution--

Amendment 1	-Appendix G
Amendment 14	-Appendix G
RCW 4.84.185	-Appendix H

THE FACTS

This was an action filed in 1980 by the Aquarian Foundation; a Spiritualist Church, its spiritual leader, Reverend Keith Milton Rhinehart, and several representative female members, against the Seattle Times and one of its reporters. The Seattle Times is a daily newspaper in Seattle, Washington. The action alleged Defamation because of a series of articles published by the Seattle Times in which Plaintiffs claimed they were falsely portrayed as a bizarre Jim Jonesian Cult. They alleged that members experienced ostracization and violence as a result of the articles, resulting in loss of members, loss of financial support, and special and general damage to members. Sworn statements regarding the violence and resulting fear were entered in the court record; the trial court found good cause for a protective order to prohibit the newspaper from publishing names and addresses of members and financial information. [Relevant language, Appendix B.]

In an interlocutory appeal, the Washington State Supreme Court upheld the order compelling discovery. The bulk of the interlocutory opinion, however, related to the validity of the protective order, which was also being reviewed. The discussion regarding the discovery order was cryptic and devoid of a detailed discussion of the First

Amendment issues. The relevant portion of the opinion is attached in Appendix D.

Plaintiffs petitioned to this court for review, [Docket No. 82-1758] but review was opposed by the Seattle Times, who argued inter alia that because the case was not terminated in the trial court below, the decision was not ripe for review and would be an improper advisory opinion if accepted for review at that time. Review was not granted.

When the case was remanded, Plaintiffs supplemented their interrogatory answers and made their bookkeeper available for a deposition pursuant to the trial court discovery order. [Relevant portions, Appendix C]. Defendants also moved to compel several videotapes, which action was opposed by Plaintiffs. Plaintiffs asserted the videotapes were sacred and proposed a protective order to allow viewing of the tapes by Defendants. The trial court refused to grant any protective order, although the video tapes also depicted members.

On January 5, 1987, the trial court entered 2 orders of dismissal--one for failure to produce membership lists, and one for failure to produce the videotapes.

Plaintiffs appealed, and the Washington State Court of Appeals denied the appeal, and found the appeal frivolous, remanding the case to the trial judge for imposition of "reasonable" attorneys fees pursuant to RCW 4.84.185.[1]

Plaintiffs moved for reconsideration and reversal of the finding of frivolous; this motion was denied. [Appendix F].

Plaintiffs moved for review by the State Supreme Court, and the Petition for Review was denied by Order dated November 29, 1988. [Appendix G].

QUESTIONS TIMELY RAISED ON APPEAL

Issue 1 was raised in the trial court by written objection. It was raised by interlocutory appeal and resulted in the State Supreme Court's ruling in relevant portions-- Appendix D

Issue 2 was raised in response to Defense Motion to compel discovery, and timely appealed as reflected in The State Appellate Court ruling, Appendix E.

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[1]On January 9, 1989, the trial court summarily ordered $64,752.02 in fees against Plaintiffs. The trial court denied a request for a stay pending this appeal, a continuance in order to obtain discovery, a jury trial, and any type of evidentiary hearing. The fee amount was also alleged excessive--Times attorneys had published a claim for fees of "more than $38,000.00" when fees were awarded, but by the time fees were formally applied for in court, the amount had swelled by over $24,000.00. King County Cause No. 80-2-02460-4, no appellate court number assigned to date.

Issue 3 was raised promptly after the finding of frivolous in the Appeal Court's decision [Appendix E], both in a motion for Reconsideration [denied, Appendix F], and a Petition for Review to Washington State Supreme Court, [denied, Appendix G].

ISSUE I

DID THE STATE TRIAL COURT VIOLATE RELIGION'S FIRST AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION AND RELIGION [AS PROTECTED BY THE 14TH AMENDMENT] BY DISMISSING DEFAMATION LAWSUIT WHEN RELIGION FAILED TO PRODUCE MEMBERSHIP LISTS, ORDERED IN DISCOVERY?

This issue raises a critical constitutional question that should be reviewed by the United States Supreme Court because:

A. The State Court found against the protection of Aquarian Foundation's constitutional rights and the U.S. Supreme Court is the court of last resort.

The First Amendment Constitutional right, enforced as to the States through the 14th Amendment Due Process clause, to Freedom of Association is protected form intrusion. One such intrusion protected from is identification of members of groups holding minoritorian belief. See Gitlow v. New York, 268 U.S. 652, 666 45 S. Ct. 625, 629, 69 L.Ed. 1138; Palko v. Connecticut, 302 U.S. 319, 324, 58 S. Ct. 149, 151, 82 L.Ed. 288; Cantell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213; Staub v. City of Baxley, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302.

The decision on interlocutory appeal in this matter held that the trial court could order that membership lists by produced subject to a protective order keeping member identities confidential during discovery.

[Relevant parts, Appendix D]. On appeal from dismissal of the case after Aquarian Foundation failed to produce the membership lists, the Washington Court reiterated its position ordering disclosure of the membership lists. [Appendix E]. In neither opinion did the court address the issue of how the State intrusion into the Aquarian Foundation members' right to freedom of association could be so compelling that it outweighed the Constitutionally protected rights. Not one shred of evidence of record was presented by defendants Times, et al, to justify the need for membership lists and not one iota of evidence was presented by the Times, et al, that any alternative attempts at discovery had been attempted. Instead, the Times relied on the unequivocable demand for membership lists, with the obvious goal of obtaining dismissal of the defamation action against it. It did not even bother to depose the bookkeeper, depose the numerous officers and officials identified to it, or review the extensive financial source documents offered to be available at the bookkeeper's deposition.

Rather than require the Times, et al, to seek alternative sources of discovery, or to demonstrate prejudice by lack of the membership lists, the trial court opened that it would not require that the parties "jump through hoops". The case was summarily dismissed. This ruling is constitutionally repugnant. Review of this ruling is, therefore, appropriate because the State Court has ruled on a federal right, denying the validity of that right. 28 USC. 1257.

B. Review is appropriate because the State Court decision conflicts with the decisions of highest courts of several jurisdictions, including the most closely analogous U.S. Supreme Court Case, NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 [1958].

NAACP was a case where the State of Alabama sued the organization, purportedly to exact compliance with a state qualification statute. Contempt penalties of $100,000.00 were assessed against NAACP for failing to produce lists of rank and file members, NAACP was foreclosed from having the merits of the action determined. This court held that,

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."
>
> "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U.S. at 462.

Both in NAACP and the instant case, Petitioners demonstrated that rank and file members had been subjected to harassment and violence. Indeed, Aquarian Foundation attributes this harassment to the Times, et al, and its false and defamatory publicity.

The court in NAACP rejected the argument that private community pressures, and not the State, may directly cause the harassment; rather, that State action via the judicial system has created the opportunity for private action is sufficient state action to give rise to the Constitutional protection. 357 S.Ct. at 462. In this case, Aquarian Foundation objected to its rank and file members being disclosed to a hostile press, waiting with baited breath to "publish all", if not during discovery then

discovery then during trial in the matter. The potential harm is thus greater to Aquarian Foundation than it was to the NAACP, where although the membership lists were to reach the public record, they were not to reach the files of a daily newspaper waiting to present the identity of members to every person in Seattle via the morning paper.

As in NAACP, Aquarian Foundation did not object to disclosing identity of members who hold official positions. The objection was to the rank and file members being subjected to disclosure.

As in NAACP, Times, et al. justifies its need for membership lists to discover the exact nature of the activities of Aquarian Foundation. As in NAACP, Aquarian Foundation has produced varied business records, its charter and by-laws, names of directors and officials, total number of members, and total income, in addition to extensive financial and other data requested in discovery.

Under NAACP, the interest that must be shown to obtain disclosure is a "compelling State Interest." Id. at 462. Yet, the Times, et al, never showed a compelling interest, never demonstrated prejudice, never showed the attempt to obtain discovery by alternative means.

The State Court's failure to apply NAACP to this case constitutes a violation of Aquarian Foundation's constitutional rights.

C. Other jurisdictions have held, similarly to NAACP, that compelling disclosure of Church members and donors is unconstitutional. See Surinach v. Presquera de Pusquets 604 F.2d 73 [1st Ar. 1979], Church of Hadeem, Inc. v. Supreme Court, 110 Cal. App. 384, 168 Cal.Rptr. 13 [1980].

These authorities specifically dealt with situations where the issue was disclosure in pretrial discovery in a civil case. See also, Britt v. Superior Court 20 Cal.App. 384, 168 Cal.Rptr. 695 [1978].

Eilers v. Palmer 575 F.Supp. 1259 [Minn. 1984] upheld the right of minoritarian religion membership lists to be withheld from civil discovery. In that case, the trial court had entered a protective order but the appellate court never the less ruled that compelling disclosure would genuinely interfere with protected interests.

Emphatically the State Court in this matter has ignored both the methodology--the search for compelling state interest--and the the result of these significant precedents, and therefore its decision must be reviewed.

D. This decision also conflicts with the rationale in the case law outside Washington State, where there are a few narrow exceptions ordering membership lists. In those cases, lists are ordered only where violence is advocated or where the Constitutional freedom is waived.

While the above cases set forth the rule regarding the constitutionally protected status of membership lists, there are very narrow exceptions to the rule, none of which are relevant herein. The narrow exceptions fall within the "compelling state interest" criteria. A compelling state interest requires a very high standard of proof. The chilling effect of membership disclosure is built into the purposes for which disclosure has been found legitimate. These purposes are historically, to deter the activities of organizations that advocate violence or unlawfulness. Familias Unidas v. Brisco, 544 F.2nd 182 [5th Cir. 1976]. See People of the State of New York ex. rel. Bryant v. Zimmerman, 278 U.S. 63, 49 Sct. 61, 73 L.Ed. 184, [Compelling lists upheld for Ku Klux Klan, which organization's activities included unlawful intimidation and violence].

Aquarian Foundation is a Spiritualist Church and the only violence of record is the harassment of members, subsequent to the yellow journalism of the Times, et al.

If a group has never advocated an unlawful purpose, disclosure of members is repugnant to the constitution. Familias Unidas, 619 F.2nd 182. A person may be a member of a group for a number of complex motivations, and disclosure is not tolerated for those not anticipating proscribed conduct. Id. Thus, in this case, rank and file members who joined the Aquarian Foundation to practice the religion of their choice do not fit into the very narrow criteria that would compel disclosure.

Moreover, rank and file Aquarian Foundation members never waived their privilege to Freedom of Association. That is a Constitutional right personal to them, which cannot be waived by Aquarian Foundation. Church of Hakeem. Supra.

E. The U.S. Supreme Court should review this compelling and substantial issue of minoritarian Religious associational rights. The Aquarian Foundation can obtain no relief in State Court without sacrificing the rights of its rank and file members. In this case, Aquarian Foundation sought to stop a hyped-up attack by the press on its very existence as a Church, only to learn in court that its existence was again challenged because in order to obtain relief in court it was ordered to surrender its rank and file membership list.

The facts of this case demonstrate how the alleged aggressor, Times, et al, was able to obtain dismissal of the lawsuit without ever engaging in good faith discovery.

The State Court not only failed to reach the result in the above cases, but also failed to apply the criteria therein. In ordering the membership lists, the State Court also failed to utilize the least

restrictive means of achieving the information on the alleged damages and activities of the Aquarian Foundation.

The record is devoid of any showing by the Times, et al that there was prejudice to the defense in not obtaining a membership list. Even if the list were critical, disclosure should be compelled only after exhausting every reasonable alternative source of information. UAW v. National Right to Work Legal Defense & Educational Foundation 590 F.2d 1139 [DC Cir. 1979]. See Carry v. Hume, 492 F.2d 631 [D.C. Cir.].Cert. dismissed, 417 U.S. 938, 94 Sct. 2654, 41 L.Ed. 2d 661 [1974], where as many as 60 depositions was considered a reasonable prerequisite to compelled disclosure.

If review is not granted in this case, the denial of review will be tantamount to a blue print for parties who wish to defame, harass, and destroy minoritarian organizations. These parties can avoid answering for their defamatory statements by responding to any lawsuit by demanding membership lists. The minoritarian organization then is subject to destruction if the defamation continues, or if the chilling effect of disclosure is imposed. In this way, the Defendants can avoid ever trying the merits of the case and can obtain dismissal of the case.

The freedom of associational concept will this be denied to Religions such as the Aquarian Foundation.

There is no U.S. Supreme Court decision specifically determining the issue herein, but it is a critical Constitutional issue that fundamentally impacts the associational rights of persons who choose to join organizations that hold minoritarian or unpopular views or beliefs, but do not advocate violence.

ISSUE II

DID THE STATE TRIAL COURT VIOLATE RELIGION'S FIRST AMENDMENT RIGHTS TO FREEDOM OF ASSOCIATION AND RELIGION, BY DISMISSING DEFAMATION LAWSUIT WHEN RELIGION FAILED TO PRODUCE VIDEOTAPES OF MEMBERS, ORDERED IN DISCOVERY, BUT NOT PROTECTED BY A PROTECTIVE ORDER ALTHOUGH, GOOD CAUSE FOR PROTECTION HAD PREVIOUSLY BEEN FOUND BY THE COURT?

The above arguments, pertaining to ISSUE I, also apply to ISSUE II regarding the videotapes that were compelled in discovery, in that the videotapes also depicted the countenances of members.

There are several additional reasons why review of dismissal as to the videotapes should be granted.

A. There was no protective order entered to limit usage of the videotapes.

The only protective order in this matter pertained to "names and addresses of members" and to financial information. [Appendix B] It did not pertain to the "identity" of the members, as the State Court incorrectly held in its 1988 decision. [Appendix E] Hence, production of the videotapes could have resulted in the Times, et al, immediately publishing or releasing the tapes for public airing. This would have undermined the effect of the protective order, and would have subjected the tapes, consecrated as sacred by the Church, to disclosure in a hostile, secular setting.

The State Court begged the question presented by the videotape issue, first by calling the sacredness of the tapes "questionable". This paternalistic evaluation of the religious beliefs of the Aquarian Foundation directly conflicts with the criteria to be used when evaluating the constitutionality of intrusion into a religious practice. The general rule is, as long as a belief is sincerely held, then the court must not inquire into the believability of a belief that is religious in nature.

> It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the founders did not intend for them to be declarants of religious orthodoxy.

Africa v. Pennsylvania, 662 F.2d. 1025,
Citing U.S. v. Ballard 322 U.S. 78.

As a consequence of the State Court's failure to seriously consider the Aquarian Foundation's right to prevent the violation of sacred objects in that Religion, the issues of free association and free exercise were avoided.

B. The State Court articulated a spurious First Amendment news interest in finding that the proposed protective order was not appropriate.

The State Court mouthed contradictory holdings in order to create a fictional first amendment interest of the media Defendants.

In this case, recall that the trial court has previously found good cause to protect members' names and addresses in its first protective order. On interlocutory appeal, the State Court held:

> "The more extensive protection which [the Plaintiffs] desire is within the discretion of the trial court in a proper case, but the Plaintiffs are not entitled to such an order as a matter of right." See Rhinehart, Appendix cited at 232.

Therefore, the protective order proposed by Plaintiffs could have been entered.

On the very same page, the State Court disregarded its own holding, by stating:

> Thus had the Appellants sought such a protective order [presumably an order protecting only members' identities] as to the compelled discovery of the films and videotape, it could not have been attacked on these First Amendment grounds. Instead, the Appellants sought a protective order which would have imposed other restrictions and conditions. Id.

Nowhere is there a First Amendment challenge to the protective order proposed by Plaintiffs as to the videotapes. This nonsensical State Court paragraph rejecting the Plaintiffs' proposed protective order also fails to further analyze the fabricated First Amendment grounds that purportedly were a basis for its decision.

In fact, the trial court had found good cause for protection. In fact, Aquarian Foundation had not refused to produce the tapes; but proposed a protective order which would allow for discovery in the least restrictive manner. Defendants Times, et al did not show any reason why their discovery needs would not be fulfilled by that protective order, and failed to propose any other protective order.

Because the order proposed was within the discretion of the trial court, because it proposed the least obtrusive means, and because no other proposed protective orders were before the court, the trial court violated Plaintiffs' First Amendment rights in failing to enter the requested protective order.

The reasons for accepting review are magnified by the State Court's intrusion into the right of Aquarian Foundation to assert and have its religious objects free from hostile violation; and its total failure to apply any protective order to the videotapes, in spite of its earlier "good cause" finding.

ISSUE III

DID STATE APPELLATE COURT VIOLATE RELIGION'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION BY APPLYING RCW 4.84.185 IN A MANNER TO IMPOSE PENALTIES FOR A "FRIVOLOUS" APPEAL WITHOUT PROVIDING CLEAR CRITERIA FOR WHEN SUCH PENALTIES WOULD BE IMPOSED, WITHOUT IMPOSING THE SAME PENALTIES AGAINST OTHER SIMILARLY SITUATED LITIGANTS AND WITHOUT CONSIDERING THAT THE ONLY AVENUE TO PRESENT THE ABOVE CONSTITUTIONAL ISSUES TO THE U.S. SUPREME COURT IS TO PROCEED THROUGH STATE COURT EVEN IF THE STATE COURT IS NOT LIKELY TO UPHOLD THE APPEAL.

RCW 4.84.185, set forth in Appendix H in relevant part, allows the State Court to impose reasonable attorneys fees and costs against parties who bring frivolous actions or appeals. In this case, the trial court did not find the defamation action frivolous, but the appellate court awarded fees and costs for a "frivolous" appeal. The Statute in no sense defines the term "frivolous". The trial court imposed approximately $65,000.00 upon remand.

A. This court should review RCW 4.84.185 as enforced by State Court because it violates the right to due process in imposing fees and costs without notice.

Imposition of fees and costs--essentially a penalty for having utilized court processes--is triggered if the action or proceeding is "frivolous". As enforced, this statute fails the tests for complying with the due process clause.

Washington courts have adopted correct criteria regarding the due process clause of the Fourteenth Amendment, which requires that a statute or rule give fair notice of what is prohibited or required. Gibson v. City of Auburn, 50 W.App. 561, 748 P.2d 673, 676 [1988], citing; State v. Reader's Digest Association, Inc., 501 P.2d 290, 300, 81 W.2d 259 [1972]. If a statute fails to give fair warning as to what is prohibited, it is subject to a vagueness or indefiniteness challenge. Id. at 300. In order to withstand a vagueness challenge, a statute must have two components: "[1] it must give adequate notice of prohibited conduct so that a person of ordinary intelligence would not have to guess at its meaning, and [2] it must have adequate standards to prevent arbitrary enforcement." State v. Markham, 697

P.2d 263, 40 Wash.App. 75 [1985]; citing, State v. Maciolek, 101 W.2d 259, 264-64, 676 P.2d 996 [1984].

The first component that must be met in order to withstand a vagueness challenge has been identified as the "common intelligence" test. In order for a statute to be found to give fair warning under the common intelligence test, the statute must meet the "common intelligence" test. Under this test, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." State v. Reader's Digest Association, Inc., 81 W.2d 259, 300, 501 P.2d 290 [1972]; Gibson v. City of Auburn, 18 P.2d 673 [1988].

RCW 4.84.125 fails to withstand the two pronged vagueness challenge. The statute fails to meet the first prong, the "common intelligence" test because the terms of the statute are so vague as to require that persons of common intelligence guess at the meaning of the statute.

The language that causes the constitutional violation in the present case stems from the requirement that reasonable expenses are incurred in defending an action deemed "frivolous".

In addition to failing to meet the first prong of the vagueness test, 4.84.185 also fails to meet the second prong of the test. The second prong requires that a statute have adequate standards to prevent arbitrary enforcement. Because the statute does not provide adequate standards to prevent arbitrary enforcement, such as finding Aquarian Foundation's appeal "frivolous", the statute again violates the Fourteenth Amendment. In this case, standards for the key term "frivolous", is insufficient to prevent arbitrary enforcement. The result herein is instructive: the Court found this appeal to be purportedly, so frivolous that it not only lacked merit, but that reasonable minds could not differ as to its frivolity. This would be an open and shut case. Meritless on the face of it. By definition it would be subject to no reasonable argument in its support. Yet the Court on remand awarded, in the face of this finding, approximately $65,000.00 in fees, finding it "reasonable" that purportedly competent counsel would spend approximately 650 hours to respond to the "frivolous" arguments on appeal. This is arbitrary, capricious, preposterous, and impossible in any system of logic or jurisprudence.

The only result of this case is to set up an arbitrary precedent that will create a chilling effect to prevent particularly unpopular groups and litigation issues from litigating.

1. "Frivolity" is an ill-defined concept in Washington state case law.

The word "frivolous" is dictionary-defined as:

> "void of significance or reason; petty trivial. Characterized by lack of seriousness, sense, or reverence. Trifling, silly." The Practical Standard Dictionary of the English Language Funk and Wagnall's Company [1927]

In Washington State, Standards for frivolity are established only on a rudimentary conceptual basis. There is no body of caselaw, however, that will set forth the philosophical basis for the standards: to the contrary, there is no evolution of reasoned thought to justify why and how Washington's frivolity standards exist. There is also very little caselaw applying specific facts to the rudimentary concepts that exist.

Rudimentary concepts of frivolity are vague because they are based upon predicting the success of litigation.

A case is frivolous when the court is convinced that it presents no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there is no reasonable possibility of reversal. Griffen v. Draper, 32 W.A. 611, 649 P.2d 123 [1982]; Del Guzzi Construction Co. v. Global N.W., 105 W.2d 878, 719 P.2d 120 [1968].

A case dismissed because the arguments are rejected is not frivolous. Halvorson v. Fergeson, 46 W.A. 708, 735 P.2d [1987].

2. Washington case law is inconsistent with the rule of professional conduct 2.3.

No mention of RPC 2.3 as made in the Washington caselaw regarding the concept of frivolity. RPC 2.3 governs conduct of all attorneys in Washington State and provides that an attorney has not taken a frivolous position if there is a "good faith argument for an extension, modification, or reversal of existing law." A lawyer has a duty to advocate vigorously for the client.

The Washington courts, by basing the frivolity standard on the probable success of litigation, precludes the good faith argument for extension, modification, or reversal of a legal concept. This body of decisional law threatens to remake the attorney-client relationship so that a lawyer will be shackled when making good faith arguments for the client.

The lawyer runs the risk of causing the court to penalize the client, if unpopular views are argued. The lawyer therefore becomes a slave to the conformity of stare decisis instead of the advocate that the client has a right to, and for which the legal system is designed. This creates a conflict in the very basis of the lawyer's role, and the obligation of

undivided loyalty to the client's legitimate interests. The Washington lawyer cannot predict the parameters of his or her duty.

3. Frivolity is a vague, undeveloped concept.

Not only does the decision fail to be based on a clear criteria presented in Washington Law, and a conflict with lawyers' professional conduct rules, it imposes terms which punish litigants for a legitimate use of the court system. It substantially changes the traditional application of the term "frivolous" to litigation.

The concept of frivolity was traditionally reserved for the patently absurd. It does not apply to the unpopular, the rejected theory, or the erroneous proposition. Free flow of ideas in the legal market place is safeguarded through many sources including the First Amendment of the U.S. Constitution regarding freedom of speech and adopted as to the States via the Fourteenth Amendment. A nation wide state and federal computer search of the frivolous action criteria nets 40% of both state and federal cases occurring in the past 10 years. Along with the increasing number of cases have come a hodge-podge of somewhat unscientific criteria as to what is "frivolity".

Those cases setting forth factual examples of frivolity hearken to truly baseless claims--i.e.: A motion to change venue when the forum was the residence of both parties and of the occurrence of the acts underlying the action Hauck v. Trania Auston Homes, 467 S.2d 707 [Fla.App. 5 Dist. 1985]. An obvious failure to prosecute an appeal, and failure to address any issues whatsoever. McAnnally v. Levco, 456 So. 2d 66 [Ala. 1984].

In Washington State, frivolity is defined in principle by Streator v. White, 26 W.App. 430, 613 P.2d 187 [1980].

> [1] A civil appellant under RAP 2.2; [2] all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; [3] the record should be considered as a whole; [4] an appeal that is affirmed simply because the arguments are rejected is not frivolous; [5] an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Factually, in Streator, however, the real issue was that the appeal was based on a challenge to findings of fact and not to legal principles. Therefore, by definition the appeal on its face was frivolous.

In this case, Aquarian Foundation directly challenges legal principles of Constitutional magnitude and sets forth logical arguments for extension or reversal of legal principles. Therefore, the concept of frivolity is vague and past caselaw gives no notice that Aquarian Foundation's appeal would be found frivolous.

4. "Frivolity" has not been previously reviewed by this court, yet this case presents a new development in this arena that will chill access to the courts.

Other courts have different standards of frivolity which are more amenable to modifying existing law. For example, in Oklahoma, the test for determining if an action is frivolous or without merit is whether Plaintiff cannot make rational argument on the law or facts in support of his claim. Davis v. Oklahoma Department of Correction, 516 F.Supp. 5. New York has taken the position that attorneys and litigants should not be inhibited from pressing novel issues or in setting forth a position that can be supported by good faith argument for extension, modification, or reversal of existing law. Code of Prof. Resp., DR7-102 [A] [1]; Ltown Ltd Partnership v. Sire Plan, Inc., 489 NYS 2d 567, 108 A.D. 2d 435.

Likewise, the comment to ABA Model R 301 asserts that an advocate has a duty to use legal proceedings for the fullest benefit of the client's cause, and that in determining the appropriate scope of advocacy, one must take account of the law's ambiguities and potential for change. ABA Model R.3.1. The comment further states that the filing of an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. Id. An action, according to the ABA, is only frivolous if the client desires to have the action brought mainly for the purpose of harassing or maliciously injuring the opponent, which is not the case here, or if the lawyer is unable to either make a good faith argument on the merits or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. ABA R Model 3.1.

Similarly, California views an appeal as frivolous only when it is prosecuted for delay or when it indisputedly has no merit. Berger v. Godden, 210 Cal. Rptr. 109, 163 C.A. 3d 1113 [1985]. North Dakota holds that, though appeals must have some legitimate basis in fact and law, appeals must by necessity test the validity of established legal principles and seek the adoption of new legal propositions. Mitchell v. Preusse, 355 N.W. 2d 511 [1984].

Federal law likewise presents a traditional view of frivolity that tolerates the unsuccessful litigant. For example, in Velson v. Predmont Aviation, Inc., 750 F.2d 2.34 [1984], the court viewed an Appellant's attempt to extend the breadth of a law as not frivolous in a case of first impression.

In general, "frivolity" as traditionally defined, is emphatically not the same as meritless. In Re Marriage of Flaherty, 31 Cal.3d 637, 650, 183 Cal Rptr. 508, 516, 1517, 646 P.12d 179, 187-188. See also, Ltown Lmtd. Partnership v. Sire Plan, Inc., 489 N.Y.S. 2d 567 at 574, 108 A.D. 2d 245 at 442 [1985]. Furthermore, traditionally, "all doubts as to whether an appeal is frivolous should be resolved in favor of the Appellant." In Re Estate of Pesterdoff, 37 Washington App. 418 at 424, 680 P.2d 1062 at 1066; See also, Breshears v. Malan Oil Co., 671 S.W. 2d 40 at 404 [Mo. App.]. Significantly courts outside of Washington State hold that sanctions should not be imposed except in the "clearest cases" Ltown Ltd., supra at 574; Corona v. Lundgran, 158 Cal.App. 2d 764, 768, 204 Cal.Rptr. 846 at 849.

As to the interpretation of the "clearest cases", Ltown cites frivolity by any standard, such that there can be "no tenable claim that the issues tendered are, in any sense, arguable or that the case presents some reason to modify established decisional law." Id.

Such is the standard of frivolity espoused by other jurisdictions - where there is absolutely no basis in fact or law for bringing an action.

Federal law further supports Appellants view of the lack of standards in the Washington Court in its finding of "frivolity". For instance, in Smithbay v. Hospital Administration, 841 F.2d 751 [1988], the court held that based on 28 USCA 1915 [d], a complaint is frivolous at the preliminary stages of litigation only if the Plaintiff can make no rational argument in law and fact to support his claim for relief. Id. Further, a court should not dismiss a complaint as frivolous unless there is "indisputedly absent any factual as well as legal basis for the asserted wrong." Id. "Frivolity" traditionally embraces truly silly, baseless actions, i.e., in Glick v. Gutbrod, 782 F.2d 754 [1986], the court awarded reasonable attorney fees for defending a frivolous appeal when the losing party unsuccessfully brought an action in federal court to vacate a prior correct state decision in a foreclosure action where the party failed to provide any real legal or factual support for his argument and when he ignored the district court's encouragement for them to seek competent legal counsel. Clearly the court in Glick set a higher threshold of frivolity than the State Court in the present case, one wherein the party neglects to supply any basis for relief or to follow the court's directions.

And in Malone v. Colyer, 710 F.2d 258 [1983], the court held an action to be frivolous only if it appears beyond a doubt that the Plaintiff can prove no set of facts entitling him to relief. Finally, it cannot be said that Appellants have failed to state a claim, or repeatedly litigated already-determined issues or assert allegations that are beyond credibility, all standards which federal courts look to in determining frivolity. See, Anderson v. Conghein, 700 F.2d 37 [1983].

Appellants, as set forth herein, brought highly substantive issues to the State Court for review, supported by legal precedent of constitutional magnitude. Appellants had no prior notice that the State Court would impose tens of thousands of dollars to penalize them for bringing these issues to court. They were put in a position of guessing whether or not they could be penalized. Consequently they were deprived of due process when the State Court summarily made an finding of frivolity in this matter.

Moreover, there are no standards to predict when and whether the State Court will enforce this statute. It can deem unpopular litigants to be "frivolous", or it can virtually deem anyone unsuccessful to be "frivolous". Bringing an action on appeal becomes a game of Russian roulette as to whether or not litigants will be punished for raising issues--particularly issues challenging the status quo.

Therefore, the U.S. Supreme Court must review this issue which is of importance to the very fundamental character of litigants' rights in this State.

B. The trial court's finding of frivolity violated Appellant's 14th Amendment Right to Equal Protection.

1. The 14th Amendment protects the right to be treated equally under the law with similarly situated others.

The Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The clause guarantees that those similarly situated will be treated similarly. Flowers v. Webb, 575 F.Supp. 1450 [1983]. If a fundamental right is involved, as it is in the present case, the Court must use a strict scrutiny analysis. In order to uphold the dissimilar treatment, the act or event must be necessary to promote a compelling governmental interest.

2. The finding of frivolity treats Appellants, a religion, who have advocated less well established legal principles, and or the extension or modification of those principles to their case, less favorably than other cases based upon colorable arguments, filed by non religious groups.

First, by voicing "frivolity" criteria that is based upon whether or not a claim on appeal is likely to be successful, the State Court is directly discriminating against Appellants who challenge the status quo.

Secondly, the ruling as to the Aquarian Foundation that the appeal is frivolous directly conflicts with how the State Court has treated

other litigants. In Motel Employees Local 8 v. Glen Johnson, 51 Wm.App. 676 [June 1988], the State Court held an appeal not frivolous if appellant can cite other authority in support of his or her position. As cited herein, there is extensive authority for Appellants' position on appeal--in addition; Appellants' appealed the interpretation of the priest-penitent statute that had never before been interpreted by the Appeals Court. Aquarian Foundation's right to access to the courts on the same basis of other more traditional litigants must be protected. The State Court need not embrace their beliefs, but it must not express scorn for their right to hold beliefs of their choice.

Significantly, See, State v. Maxon, 110 W.2d 564 [1988], where the State Court did not find frivolous an appeal attempting to identify a new parent-child privilege there is no such privilege recognized or created by statute in Washington State. Yet, the State Court did not find the Maxon Appellants frivolous. Aquarian Foundation's appeal on this subject was based upon statutory authority, a statute creating a priest-penitent privilege, and presented a position presented in other discussions of this privilege and its scope. The position was the minority position, but it was a valid and arguable position and was not precluded by the statutory language. Nevertheless, the State Court wrongly deemed Aquarian Foundation frivolous.

Review of the State Court's application of the concept of frivolity is doubly critical in that it affords an arbitrary arm to use in penalizing unpopular litigants; in this case, Aquarian Foundation's right to Equal Protection of the law has been violated.

C. Equal protection issue herein is more critical because State Court remedy must be sought prior to brining issues to U.S. Supreme Court.

Even if Aquarian Foundation knew that the Washington State Court was unlikely to reverse certain of its previous rulings, the only avenue to appeal the erroneous State decisions to the U.S. Supreme Court is by first exhausting State remedies. 28 USC 1257, 28 USC 2101.

Therefore, the State Court "frivolity" criteria penalizes the litigant who seeks a federal forum to assert federal rights. The finding of frivolity, therefore, in a case of appealing a Constitutional issue, works to chill the exercise of that right and is repugnant to the 14th Amendment Due Process Right.

This issue has not previously been reviewed by this court and presents a serious Constitutional issue for which review is of moment to countless State Court litigants.

CONCLUSION

The U.S. Supreme Court is presented with three significant issues to review. They are Constitutionally significant and present compelling issues of State intrusion into rights guaranteed by the First and Fourteenth Amendments.

Dated this _____ day of _____, 1989.

_____
Jean Schiedler-Brown
Attorney for Appellant